

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

INSITU, INC.,
Plaintiff,
vs.
MARK KENT,
Defendant.

NO. CV-08-3067-EFS

**ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

Before the Court, without oral argument, is Plaintiff Insitu's Motion for Summary Judgment. (Ct. Rec. 8.) Insitu asserts that the Separation Agreement and Release ("Release") entered into by the parties bars Defendant Mark Kent's counterclaims as a matter of law. Mr. Kent counters that the factual issues regarding the Release's enforceability remain for trial. After reviewing the submitted material and applicable authority, the Court is fully informed and, for the reasons set forth below, grants Insitu's motion.

1 **A. Statement of Facts¹**

2 Mr. Kent, an experienced financial consultant, began working for
3 Insitu in June 2007. (Ct. Rec. [35](#) ¶ 2.) While the employment
4 agreement's precise terms are disputed, the parties agree that as Vice
5 President, Chief Financial Officer, and Treasurer, Mr. Kent was granted
6 an option to purchase a quantity of stock that would vest over a four-
7 year schedule. *Id.* ¶ 4. On March 5, 2008, Insitu terminated Mr. Kent's
8 employment. *Id.* ¶ 6. After Mr. Kent's discharge, the parties, each
9 aided by legal counsel, entered into negotiations to agree on the terms
10 of Mr. Kent's discharge. *Id.* ¶ 9.

11 During the negotiations, Insitu informed Mr. Kent that, while
12 Insitu had engaged in formal acquisition talks with Boeing, there was
13 virtually no likelihood for there to be an ownership change in the near
14 future. *Id.* ¶¶ 60-62. The financial strain resulting from Mr. Kent's
15 termination forced him to sell his house in Washington in order to move
16 to California, where he believed he would have better access to future
17 employment opportunities. *Id.* ¶ 63. After sharing his financial
18 concerns with Insitu, Insitu offered to help him sell his home, provide
19 him with work opportunities through a consulting agreement, and provide
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21 ¹ In ruling on a motion for summary judgment, the Court considered
22 the facts and all reasonable inferences therefrom as contained in the
23 submitted declarations, exhibits, and depositions, in the light most
24 favorable to Mr. Kent, the party opposing the motion. *See United States*
25 *v. Diebold, Inc.*, 369 U.S. 654, 655 (1972) (*per curiam*). The following
26 factual recitation was created utilizing this standard, along with the
27 parties' Joint Statement of Uncontroverted Facts (Ct. Rec. [35](#)).

1 strong references for future employment - all in exchange for Mr. Kent's
2 signature on the Release. *Id.* ¶¶ 52, 64-70.

3 The parties signed the Release on April 25, 2008. *Id.* ¶ 72. Under
4 the Release, Mr. Kent surrendered his rights to Insitu stock options in
5 exchange for a \$115,000.00 severance payment. *Id.* ¶ 74. The Release
6 expressly states that neither party relied on any statements that were
7 not documented in the Release, and that neither party entered into the
8 agreement as a result of duress or coercion from any source.² *Id.* ¶ 19.
9 These statements are referred to as the "no-reliance clause."

10 Insitu did not provide Mr. Kent with consulting service contracts
11 and timely references to prospective future employers. *Id.* ¶ 55. On
12 July 21, 2008, three (3) months after Mr. Kent signed the Release,
13 Boeing and Insitu entered into an agreement under which Insitu became a
14 wholly-owned Boeing subsidiary. *Id.* ¶ 79. As a result, had Mr. Kent
15 retained his stock options, those options, assuming they vested, would
16 have been valued at much more than the severance amount paid to Mr. Kent
17 in accordance with the Release. *Id.* ¶ 81.

18 Following Boeing's acquisition of Insitu, Mr. Kent tendered the
19 return of the severance payment in exchange for the vacation of the
20 Release as null and void. (Ct. Rec. [29](#).) Insitu refused and, on
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22 ²The Release states in pertinent part:

23 12. Employee acknowledges that in executing this Agreement,
24 Employee does not rely upon any representation or statement by
25 any representative of Employer concerning the subject matter
of this Agreement, except as expressly set forth in the text
of the Agreement.

26

27 14. Employee . . . now enters into this Agreement without
duress or coercion from any source.

1 October 31, 2008, filed this lawsuit for declaratory relief that Mr.
2 Kent cannot rescind the Release and is therefore barred from claiming
3 rights to Insitu stock options. *Id.* Mr. Kent answered, stating that
4 the Release should be declared unenforceable because 1) he was
5 fraudulently induced with false misrepresentations and promises by
6 Insitu, 2) promissory estoppel bars enforcement of the Release, and 3) he
7 was under duress at the time he signed the release. *Id.* Further, Mr.
8 Kent filed a counterclaim for declaratory relief stating that the
9 Release is void and unenforceable because of fraudulent
10 misrepresentation, promissory estoppel, and duress, and declaring his
11 entitlement to immediate vesting of all granted stock options. *Id.*
12 Insitu now asks the Court to dismiss Mr. Kent's counterclaims. (Ct.
13 Rec. [8](#).)

14 **B. Standard**

15 Summary judgment is appropriate if the "pleadings, depositions,
16 answers to interrogatories, and admissions on file, together with the
17 affidavits, if any, show that there is no genuine issue as to any
18 material fact and that the moving party is entitled to judgment as a
19 matter of law." FED. R. CIV. P. 56(c). Once a party has moved for
20 summary judgment, the opposing party must point to specific facts
21 establishing that there is a genuine issue for trial. *Celotex Corp. v.*
22 *Catrete*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make
23 such a showing for any of the elements essential to its case for which
24 it bears the burden of proof, the trial court should grant the summary
25 judgment motion. *Id.* at 322. "When the moving party has carried its
26 burden of [showing that it is entitled to judgment as a matter of law],
27 its opponent must do more than show that there is some metaphysical
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1 doubt as to material facts. In the language of [Rule 56], the nonmoving
2 party must come forward with 'specific facts showing that there is a
3 *genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v. Zenith Radio*
4 *Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted).

5 When considering a motion for summary judgment, a court should not
6 weigh the evidence or assess credibility; instead, "the evidence of the
7 non-movant is to be believed, and all justifiable inferences are to be
8 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
9 (1986). This does not mean that a court will accept as true assertions
10 made by the non-moving party that are flatly contradicted by the record.
11 *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties
12 tell two different stories, one of which is blatantly contradicted by
13 the record, so that no reasonable jury could believe it, a court should
14 not adopt that version of the facts for purposes of ruling on a motion
15 for summary judgment.").

16 **C. Authority and Analysis**

17 Insitu asks the Court to dismiss Mr. Kent's promissory estoppel,
18 duress, and fraudulent misrepresentation counterclaims based on the
19 Release's no-reliance clause. Mr. Kent counters that, under the
20 circumstances, a jury should consider the merits of these counterclaims.

21 Washington courts follow the objective manifestation theory of
22 contracts. *Paradiso v. Drake*, 135 Wn. App. 329, 336 (2006) (noting that
23 courts look for the parties' intent by its objective manifestations
24 rather than the parties' unexpressed subjective intent). Further, when
25 construing a written instrument, Washington courts favor the
26 construction that "gives effect to all provisions of the instrument as
27 against one which renders some of them meaningless or ineffective."

1 *Wenatchee Prod. Credit Ass'n v. Pac. Fruit & Produce Co.*, 199 Wn. 651,
2 658 (1939). With these principles in mind, the Court considers Mr.
3 Kent's counterclaims.

4 1. Fraudulent Misrepresentations

5 Mr. Kent claims that the Release should be declared void because it
6 was induced by Insitu's fraudulent misrepresentations. Insitu asserts
7 that any fraud claims are barred by the Release's no-reliance clause.

8 "[A] release is voidable if induced by fraud, misrepresentation or
9 overreaching or if there is clear and convincing evidence of mutual
10 mistake." *Nation-wide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187
11 (1992). Nine (9) elements must be proven in order to establish fraud:
12 1) representation of an existing fact; 2) its materiality; 3) its
13 falsity; 4) the speaker's knowledge of its falsity or ignorance of its
14 truth; 5) the speaker's intent that it should be acted on by the person
15 to whom it is made; 6) ignorance of its falsity on the part of the
16 person to whom it is made; 7) the person's reliance on the truth of the
17 representation; 8) the person's right to rely upon it; and 9) the
18 person's consequent damage. *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d
19 915, 920 (1967). At issue are the reliance elements given that the
20 Release contains a clause stating that neither party relied on any
21 statements not documented in the Release. Because reliance is an
22 element of fraud, the no-reliance clause, if upheld, precludes any claim
23 of fraud.

24 The Washington Supreme Court has not ruled on whether no-reliance
25 clauses bar fraud and promissory estoppel claims. Therefore, the Court
26 is obligated to follow the decisions of the Washington intermediate
27 appellate courts. See *Nelson v. City of Irvine*, 143 F.3d 1196, 1206
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1 (9th Cir. 1998). Washington appellate courts offer ample guidance.³ In
2 *Helenius v. Chelius*, 131 Wn. App. 421 (2005), the Washington Court of
3 Appeals emphasized the lack of any "reliance" language before finding
4 that a fraud claim was not barred. Later, in *Kwiatkowski v. Drews*, 142
5 Wn. App. 463 (2008), the court held that no-reliance clauses bar fraud,
6 misrepresentation, and equitable estoppel claims because they eliminate
7 any reasonable reliance on external promises.

8 Here, like *Kwiatkowski*, two sophisticated parties, each represented
9 by counsel, were involved in an inherently adversarial settlement
10 agreement. Mr. Kent is an educated business man who served as Insitu's
11 Vice President, Chief Financial Officer, and Treasurer. His attorney
12 was actively involved in negotiating the Release terms and obtained
13 revisions to its terms favorable to Mr. Kent before it was executed.
14 Mr. Kent was also given twenty-one (21) days to consider whether to sign
15 the release and seven (7) days to revoke his acceptance after signing.
16 After careful scrutiny, Mr. Kent knowingly agreed that he had not relied
17 on any promises or agreements not contained in the Release.
18 Accordingly, the Court finds as a matter of law, that Mr. Kent cannot
19 prove reliance given the Release's no-reliance clause. Therefore, the
20 fraudulent misrepresentation claim is dismissed.

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23 ³See *Kwiatkowski v. Drews*, 142 Wn. App. 463 (2008) (finding that
24 plaintiff's fraud, misrepresentation, and equitable estoppel arguments
25 had no merit because they were precluded by a no-reliance clause in the
26 contract); *Helenius v. Chelius*, 131 Wn. App. 421 (2005) (emphasizing the
27 absence of any "reliance" language in the integration clause before
28 finding that a fraud claim was not barred).

1 2. Promissory Estoppel

2 Mr. Kent also counterclaims that the Release is unenforceable under
3 the doctrine of promissory estoppel because he was induced to sign by
4 Insitu's broken promises. Insitu contends that Mr. Kent's promissory
5 estoppel claim is also barred by the no-reliance clause in the Release.

6 A promise is enforceable under the doctrine of promissory estoppel
7 when a party can establish: 1) a promise which 2) the promisor would
8 reasonably expect to cause the promisee to change his position and 3)
9 which does cause the promisee to change his position 4) justifiably
10 relying upon the promise in such a manner that 5) injustice can be
11 avoided only by enforcement of the promise. *Jones v. Best*, 134 Wn.2d
12 232, 239 (1998).

13 Again, the main issue is whether Mr. Kent justifiably relied on
14 Insitu's alleged promises. As stated above, the no-reliance clause
15 eliminates any justifiable reliance on a promise that was not contained
16 within the contract. The release did not contain a promise that Insitu
17 would provide Mr. Kent with consulting service contracts and timely
18 references to prospective future employers. Given the sophisticated
19 nature of the parties and Mr. Kent's ability to negotiate the contract,
20 such alleged promises could have been included. They were not; what was
21 included was the no-reliance clause. Accordingly, Mr. Kent's promissory
22 estoppel counterclaim is dismissed.

23 3. Duress

24 Mr. Kent claims that the Release is unenforceable because he signed
25 it under duress caused by the potential harm to his professional
26 reputation and financial strains associated with prematurely losing his
27 job. Insitu states that Mr. Kent cannot and has not proved he was under
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1 any duress.

2 Mr. Kent arguably had one or more causes of action against Insitu.
3 Rather than litigate those claims, Mr. Kent hired an attorney,
4 negotiated a settlement agreement and received the benefits due under
5 that agreement. In his counterclaims seeking to void that settlement
6 agreement, with his former employer, he now claims that his job loss,
7 combined with difficulties in selling his Washington house and being
8 shunned by the small community in which Insitu is located, caused him
9 personal and financial duress. (Ct. Rec. 30: Kent Decl. ¶¶ 13-15.) In
10 a contract case where one party seeks avoidance of the contract because
11 of duress, and some other party files a motion for summary judgment on
12 that duress claim, the non-moving party then has the burden of
13 producing admissible evidence which by itself or together with
14 reasonable inferences therefrom creates a genuine issue of material fact
15 that the non-moving party was under the kind of duress that voids the
16 contract. See *Celotex Corp.*, 477 U.S. at 322 (discussing, generally,
17 the burden that must be met to survive a motion for summary judgment).
18 In Washington, the standard for duress sufficient to void a contract is
19 greater than reluctance, financial embarrassment, or pecuniary
20 necessity; rather, the party asserting duress must have been deprived of
21 free will in signing the contract. *Retail Clerks Health & Welfare Trust*
22 *Funds v. Shopland Supermarket*, 96 Wn.2d 939, 944-45 (1982).⁴
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25 ⁴An example of duress is "The Godfather" negotiation from the
26 classic film of the same name. "My father made him an offer he couldn't
27 refuse . . . Luca Brasi held a gun to his head, and my father assured
28 him that either his brains or his signature would be on the contract."
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1 Here, the asserted duress is of the type that inheres in typical
2 disputes between a terminated employee and the former employer in a
3 relatively small town where the company is a major employer. Plaintiff
4 has failed to produce admissible evidence which together with
5 reasonable inferences therefrom creates a genuine issue of material fact
6 that Defendant applied duress that deprived Plaintiff of his free will
7 in executing this settlement agreement. Accordingly, Plaintiff has not
8 met his *Celotex* burden.

9 **D. Conclusion**

10 Because Mr. Kent was unable to demonstrate as a matter of law that
11 the Release was invalid or void due to fraud, promissory estoppel, or
12 duress, the Release is enforceable.

13 For the reasons given above, **IT IS ORDERED:** Plaintiff's Motion for
14 Summary Judgment (**Ct. Rec. 8**) is **GRANTED**; Defendant's counterclaims are
15 dismissed.

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21 THE GODFATHER (Paramount Pictures 1972). Undoubtedly, before it was
22 memorialized in "The Godfather", the technique had been utilized just
23 often enough to become a figure of speech, hence the colloquial
24 figurative explanation, "What could I do? He had a gun to my head." This
25 is included as only one extreme example of duress sufficient to void a
26 contract. There are surely other forms of duress which would deprive one
27 of free will.

1 **IT IS SO ORDERED.** The District Court Executive is directed to
2 enter this Order and distribute copies to counsel.

3 **DATED** this ^{17th} day of June 2009.

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5 S/ Edward F. Shea
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 EDWARD F. SHEA
 UNITED STATES DISTRICT JUDGE

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